NEGLIGENCE

NEGLIGENCE is often defined as consisting of a breach of duty. That is wrong. The duty in such a case can be defined only as a duty to use care, *i. e.*, not to act negligently; and to define the duty so, and then to define negligence as consisting of a breach of the duty, is to define in a circle. The misconception has arisen from a failure to distinguish between a negligent wrong, which, like all wrongs, involves a breach of duty, and the negligence itself, which is one element in the wrong. It is true that negligence which in the particular case is not a breach of any legal duty is of no legal importance; but that does not touch the question of its nature as negligence. There are many cases where the law does not require care, where therefore negligence is not legally wrong; but it is none the less negligence. We must have a conception of negligence as it is in itself, independent of the conception of duty, in order that we may use it as a *praecognoscendum* in the definition of various duties. The subject of this article is the nature of negligence, not duties to use care.

There seems to be no difference in respect to its nature between contributory negligence and negligence towards others, which may be tortious. The latter, when wrongful, is a breach of a perfect legal duty owed to some one else, for whose breach an action will lie. The former may be regarded, when it has any legal effect, as a breach of an imperfect legal duty to use care for the safety of one's self or one's belongings in certain cases where some one else has an interest in such safety. The duty is a legal duty, but an imperfect duty only insomuch as no action will lie for its breach. Its sanction consists in the refusal of a remedy which might otherwise have been had for the other party's breach of duty.

Negligence is conduct which involves an unreasonably great risk of causing damage. Due care is conduct which does not involve such a risk.

Negligence is conduct, not a state of mind. It is most often caused by carelessness or heedlessness; the actor does not advert properly to the consequences that may follow his conduct, and therefore fails to realize that his conduct is unreasonably danger-

ous. But it may be due to other states of mind. Thus the actor may recognize the fact that his conduct is dangerous, but may not care whether he does the injury or not; or, though he would prefer not to do harm, yet for some reason of his own he may choose to take a risk which he understands to be unreasonably great. This state of mind is recklessness, which is one kind of wilfulness, and negligent conduct due to recklessness is often called wilful negligence. Some courts have denied that there is any such thing as wilful negligence. But that is because they have failed to distinguish between negligence, which is outward conduct, and carelessness, which is a state of mind. Negligent conduct may also be due to a mere error of judgment, where the actor gives due consideration to his conduct and its possible consequences, and mistakenly makes up his mind that the conduct does not involve any unreasonably great risk. He is not therefore excused, if his conduct is in fact unreasonably dangerous.[1] As will be explained later, he must judge and decide as a reasonable and prudent man would; so that if he is not in fact such a man, he may decide wrongly and be guilty of legal negligence though he acted as well as he knew how to. The rule that mere error in judgment is not negligence has a different meaning, which will be explained further on. Whatever the state of mind be that leads to negligent conduct, the state of mind, which is the cause, must be distinguished from the actual negligence, which is its effect. Conversely, if in a given case the actor does nothing that involves an unreasonably great risk, his conduct is not negligent, it amounts legally to due care, however careless or reckless he may be in his mind.[2] Just as a man can do wrong though his state of mind is not blameworthy, so he can do right though his state of mind is blameworthy.

Negligent conduct may consist in acts or omissions, in doing unreasonably dangerous acts or in omitting to take such precautions as reasonableness requires against danger. As will be explained below there is generally no duty to take such precautions. But the failure to take them is nevertheless negligent. It has often been laid down that negligence is doing what a reasonable and prudent man would not have done or not doing what such a man would have done. It has indeed been said that negligence always

[1] Hover *v.* Barkhoof, 44 N. Y. 113 (1870); Roberts *v.* Smith, 2 H. & N. 213 (1857).

[2] Wanless *v.* North Eastern Ry. Co., L. R. 6 Q. B. 481 (1871), per Bramwell, B.

consists in omission. This arises from confusion between negligence and carelessness. Carelessness does consist in an omission to take thought about the consequences of one's conduct; and it is that omission which has been mistaken for negligence in the legal sense.

To make conduct negligent the risk involved in it must be unreasonably great; some injurious consequences of it must be not only possible or in a sense probable, but unreasonably probable. It is quite impossible in the business of life to avoid taking risks of injury to one's self or others, and the law does not forbid doing so; what it requires is that the risk be not unreasonably great. The essence of negligence is unreasonableness; due care is simply reasonable conduct. There is no mathematical rule of percentage of probabilities to be followed here. A risk is not necessarily unreasonable because the harmful consequence is more likely than not to follow the conduct, nor reasonable because the chances are against that. A very large risk may be reasonable in some circumstances, and a small risk unreasonable in other circumstances. When due care consists in taking precautions against harm, only reasonable precautions need be taken, not every conceivable or possible precaution. And precautions need not be taken against every conceivable or foreseeable danger, but only against probable dangers.[3] The books are full of cases where persons have been held not negligent for not guarding against a certain harmful event, on the ground that they need not reasonably have expected it to happen.

Sometimes a person is under a duty to insure safety, absolutely to prevent the happening of certain damage. Such duties, which may be called peremptory duties, lie entirely outside of the law of negligence. However, the failure to perform the duty is often called negligence, or it is said that in such a case negligence is conclusively presumed, as has been said, for instance, where the keeper of a savage dog has failed to prevent it from biting some one. But that is a mere misconception, or at best a useless and misleading fiction.

The reasonableness of a given risk may depend upon the following five factors:

(1) The magnitude of the risk. A risk is more likely to be unreasonable the greater it is.

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[3] The Nora Costello, 46 Fed. 869 (1891); Flynn v. Beebe, 98 Mass. 575 (1868).

(2) The value or importance of that which is exposed to the risk, which is the object that the law desires to protect, and may be called the principal object. The reasonableness of a risk means its reasonableness with respect to the principal object.

(3) A person who takes a risk of injuring the principal object usually does so because he has some reason of his own for such conduct, — is pursuing some object of his own. This may be called the collateral object. In some cases, at least, the value or importance of the collateral object is properly to be considered in deciding upon the reasonableness of the risk.

(4) The probability that the collateral object will be attained by the conduct which involves risk to the principal; the utility of the risk.

(5) The probability that the collateral object would not have been attained without taking the risk; the necessity of the risk. The following case will serve as an illustration.

The plaintiff's intestate, seeing a child on a railroad track just in front of a rapidly approaching train, went upon the track to save him. He did save him, but was himself killed by the train. The jury were allowed to find that he had not been guilty of contributory negligence.[4] The question was of course whether he had exposed himself to an unreasonably great risk. Here the above mentioned elements of reasonableness were as follows:

(1) The magnitude of the risk was the probability that he would be killed or hurt. That was very great.

(2) The principal object was his own life, which was very valuable.

(3) The collateral object was the child's life, which was also very valuable.

(4) The utility of the risk was the probability that he could save the child. That must have been fairly great, since he in fact succeeded. Had there been no fair chance of saving the child, the conduct would have been unreasonable and negligent.

(5) The necessity of the risk was the probability that the child would not have saved himself by getting off of the track in time.

Here, although the magnitude of the risk was very great and the principal object very valuable, yet the value of the collateral ob-

[4] Eckert *v.* Long Island R. R. Co., 43 N. Y. 502 (1871).

ject and the great utility and necessity of the risk counterbalanced those considerations, and made the risk reasonable. The same risk would have been unreasonable, had the creature on the track been a kitten, because the value of the collateral object would have been small. There is no general rule that human life may not be put at risk in order to save property; but since life is more valuable than property, such a risk has often been held unreasonable in particular cases, which has given rise to *dicta* to the effect that it is always so. But in the circumstances of other cases a risk of that sort has been held reasonable.

Sometimes the collateral object, and therefore the utility and necessity of the risk, which relate to that object only, cannot be considered at all in deciding upon the reasonableness of the risk. There are certain objects which the law designs to protect, which may be called legal objects, and others which it does not attempt to protect, which may be called personal objects. Thus the law protects human life and bodily safety, the safety of property, and various other valuable objects. To some extent it protects pecuniary condition, *i. e.*, the avoidance of pecuniary loss is generally, but, as the decisions now stand, not always, a legal object. A person has rights of life, bodily security, property, and pecuniary condition,[5] and other rights in various objects or conditions of fact. But generally, subject to some exceptions which are not important here, the law does not protect the state of a person's mind or feelings. There is no general right of mental security, as there is of bodily security, which can be violated by a person's being subjected to disagreeable or painful mental experiences, such as fright, anxiety, mortification, or discomfort.

There are various special rules as to what objects are legal, to be protected by the law, and what are purely personal and are denied legal protection, which cannot be gone into here in detail. Thus an object may be made a legal one as between two persons by some agreement or arrangement between them. For example, although generally a person is not excused for taking a risk which would otherwise be unreasonable because he will thereby promote his own

[5] I have explained the nature of the right of pecuniary condition, and how it differs from the right of property, in Chapter XI of my book, LEADING PRINCIPLES OF ANGLO-AMERICAN LAW, where also I have criticised the decisions which in certain cases have refused protection against pecuniary loss on the ground that no right was violated, and tried to show that they were based on a misconception.

comfort or convenience, comfort and convenience being personal objects only, yet as between a carrier and his passenger the passenger's comfort and convenience are legal objects, and a passenger may subject himself to some risk to promote his own comfort and convenience without, as against the carrier, being therefor chargeable with contributory negligence. So the performance of a legal duty, *i. e.*, the object to be attained by such performance, is a legal collateral object. A person may be excused for taking a risk in the performance of his duty. Not so as to mere moral duties, nor as to contract duties to third persons.[6] The rule seems to be that if the collateral object is a legal one, it may be taken account of; if a purely personal one, not. Some examples of the disregarding of personal objects are as follows.

A railroad train did not stop at a station where it ought to have stopped. Therefore a passenger for that station tried to get off while the train was in rapid motion, and was hurt. He was held guilty of contributory negligence. The court said that it was no excuse that his wife was expecting him by that train, and would be anxious about him if he did not arrive. The saving his wife from anxiety was a purely personal object.[7]

A man having to attend to a sudden call of nature, out of modesty sought a place where he could not be seen. It was also a dangerous place, and he was injured. Apparently there was no other private place available. The court said that the purpose for which he went there could not be taken account of in determining whether he was negligent in doing so. The dictates of modesty did not create any legal object.[8]

A building in which were stored a large sum of money and also a horse took fire. The possessor of the building was bound to use care to save both, but it was only possible to save one. From motives of humanity he saved the horse and let the money go. He was held not to have used due care for the money. As property, the horse was of much less value than the money, and the saving of suffering to the horse was not a legal object. If he could not save both pieces of property, he should have saved the more valuable one.[9]

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[6] The James Adger, 3 Blatchf. 515 (1856).

[7] I cite this case from memory, not having been able to find it again.

[8] Van Schaick *v.* Hudson River R. R. Co., 43 N. Y. 527 (1871).

[9] Toledo, P. & W. R. R. Co. *v.* Pindar, 53 Ill. 447 (1870).

When the collateral object is the saving of expense, there is no doubt that that is a legal object. A person, though he may be bound to go to some expense to prevent harm, need not incur an unreasonable expense. The excessive expense of taking certain precautions against danger, which might have been taken, has often been held a sufficient reason for not taking them.[10] But the pecuniary condition of the person called upon to incur the expense, so that a given expenditure will be more or less onerous to him, is generally not important. The precautions which a railroad company, for instance, ought to take for the safety of its passengers are the same for a poor company, which can ill afford the expense of taking them, as for a rich one.[11] The question in such cases is: can such an expenditure be reasonably required in general? No company need take precautions which would call for an expenditure which it would be unreasonable to require from railroad companies generally. So the successful conduct of a business and the making of profits are legal objects as between all persons concerned in it; so that an employer cannot be required to take precautions for the safety of his employees in it, which would cost more than such a business could afford.

However, some courts have held that poor persons may be excused on the ground of their poverty from taking expensive precautions which a rich person would be bound to take. There are a good many cases where young children have been allowed to play in dangerous city streets unattended, and have been run over and hurt. On the question whether the child's parents were negligent in permitting him to get into the street or to be there alone, some courts have held that the poverty of the parents, which made it impossible for them to give close attention to the child, because of the pressure of other work, or to employ a servant to attend to the child, was not relevant,[12] while other courts have held it relevant.[13]

Conduct which is not directed to any object, which is aimless, is *per se* unrational. When, however, in a particular case the col-

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[10] Riddle *v.* Proprietors of Locks & Canals, 7 Mass. 169 (1810); Cooper *v.* Dallas, 83 Tex. 239, 18 S. W. 565 (1892).

[11] Denver & R. G. R. R. Co. *v.* Peterson, 30 Colo. 77, 69 Pac. 578 (1902); Pennsylvania R. R. Co. *v.* Books, 57 Pa. St. 339 (1868).

[12] Cumming *v.* Brooklyn City R. R. Co., 104 N. Y. 669, 10 N. E. 855 (1887).

[13] Del Rossi *v.* Cooney, 208 Pa. St. 233, 57 Atl. 514 (1904).

lateral object cannot be considered, it must not be assumed that the risk was taken wantonly and for no object. The question will then be, whether, considering how people generally act and the ordinary exigencies of life, it will generally be reasonable to act in that way, can a general rule be laid down that that sort of conduct is generally reasonable or unreasonable; [14] *e.g.*, is it generally reasonable to get off of a fast moving railroad train because it does not stop at one's station? However, the fact that no reason is shown for doing a dangerous act may be evidence that it was unreasonable and negligent.[15]

The test of reasonableness is what would be the conduct or judgment of what may be called a standard man in the situation of the person whose conduct is in question.

A standard man does not mean an ideal or perfect man, but an ordinary member of the community. He is usually spoken of as an ordinarily reasonable, careful, and prudent man. That definition is not exactly correct, because in certain cases other qualities than reasonableness, carefulness, or prudence, *e. g.*, courage, may be important; but it will do for our present purpose. It is because the jury is supposed to consist of standard men, and therefore to know of their own knowledge how such a man would act in a given situation, that questions of reasonableness and negligence are usually left to the jury.

Every man, whether he is a standard man or not, is required to act as a standard man would. If by chance he is not such a man, he may, as has been said, make a mistake and act so as to be guilty of legal negligence, though he has used all such care and forethought as he was capable of. In the case of contributory negligence there is an exception to this rule in the case of abnormal persons, such as children and persons of unsound mind. They are not required to act like a standard man, but only to use such judgment as they are capable of. But as to negligence which is not merely contributory, as to negligent wrongs against others, the standard man test applies to their conduct also. Women are not abnormal persons, except perhaps in respect to courage.

Anything that a standard man would do is reasonable. If there are several different courses which he might take, any one of them

[14] Le Blanche *v.* London & N. W. Ry. Co., 1 C. P. D. 286 (1876).

[15] Finlayson *v.* Chicago, B. & Q. R. R. Co., 1 Dill. 579 (1871).

is reasonable, even though one would be more reasonable than another.[16] All that the law requires of a man is reasonable conduct, not the most reasonable nor even the more reasonable. Also even a standard man, being human and therefore fallible, may err in his judgment. Conduct which in fact causes injury, if due to an error of judgment which a standard man might make, is not negligent. This is the meaning of the statement above mentioned, that mere error of judgment is not negligence. But this must be distinguished from an error which a standard man would not make.

The situation of the actor is subjective, not objective. It consists of such facts as are known to him. It would plainly be absurd and unjust to require a person to regulate his conduct with reference to facts of which he was ignorant.[17] When, however, a person knows that he is ignorant of essential facts, it may be unreasonable for him to act at all. But in some circumstances a person may be charged with knowledge which in fact he has not, and be held to accountability as if he had it. When a person is under a duty to take precautions against a possible danger, there is usually an ancillary duty to use care to find out what precautions are needed; and for the purpose of the principal duty he is charged with all knowledge which he would have got by properly performing the ancillary duty.

The jury in deciding whether certain conduct involved an unreasonably great risk are deemed to be acquainted with the teachings of common experience, and evidence to prove that is not necessary nor admissible. It has been thought that the actor himself must be deemed to have the same knowledge, and should be held negligent, if he does something that the common experience of mankind shows to be unreasonably dangerous. It is believed that the cases of the jury and the actor are not parallel, and that as to the latter there is only a *primâ facie* presumption that he has such knowledge, which he may, if he can, rebut by evidence of his ignorance. Thus if a man should try to open a can which he knew to contain nitro-glycerine with a chisel and hammer, and an explosion

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[16] Cartwright *v.* Chicago & G. T. Ry. Co., 52 Mich. 606, 18 N. W. 380 (1884); Metropolitan Ry. Co. *v.* Wright, L. R. 11 App. Cas. 152 (1886).

[17] The Nitro-Glycerine Case, 15 Wall. (U. S.) 524 (1872); Minneapolis Gen. Electric Co *v.* Cronon, 166 Fed. 651 (1908); Western Union Tel. Co *v.* Meyer, 61 Ala. 158 (1878); Blood *v.* Tyngsborough, 103 Mass. 509 (1870).

should result, if the question were of his negligence in doing so, in the present state of our knowledge the jury could find without any evidence being adduced that his act was in fact very dangerous. It would no doubt be presumed that the actor knew it; but it is believed that he would be allowed to prove in his defence that he was actually ignorant of the properties of that substance. Of course, if he thought that the can contained not nitro-glycerine but condensed milk, that belief of his would be a part of his situation, and no question would arise as to the teachings of experience about nitro-glycerine.

Supplementary to the above mentioned general principles relating to the standard man test and the nature of the actor's situation, there are certain more special rules, two or three of which will be briefly noticed by way of illustration.

A custom is usually evidence that conduct in accordance with it is reasonable. A custom includes the way of acting of standard men. It may also sometimes tend to show that conduct contrary to it is unreasonable. But the actor's own habitual way of acting is not relevant to the reasonableness of his own conduct, though it may be so on the question of what others may reasonably expect him to do.

If a person is caught in a sudden emergency, which would perturb the judgment of a standard man, and has to act quickly, he may be excused for doing something that would be unreasonable if he had had time for more deliberate action. The emergency is a part of his situation. But he must still act as a standard man would act in such an emergency.[18]

Ordinarily a person may regulate his conduct on the assumption that others will act rightly and reasonably. But in a particular case this assumption must not be persisted in, when the actor knows facts showing that it will not be true.

In certain cases skill or special knowledge is an element in due care; *i. e.*, it is unreasonable for a person who has not competent knowledge or skill to do certain acts.

The reasonableness or unreasonableness of conduct is an inference from data. The data consist of the conduct in question and the facts of the actor's situation. The existence of the data is a

[18] New Orleans, S. L. & C. R. R. Co. *v.* Burke, 53 Miss. 200 (1876).

question of fact. When the data are disputed, the question of negligence must go to the jury, with proper instructions from the court if necessary. The data being given, the inference of reasonableness or unreasonableness, of due care or negligence, is in its nature one of fact, the data furnishing the minor premise and the major premise being drawn from common experience, whereas in a true inference of law the major premise is a rule of law. Therefore the question is regularly for the jury. But in a perfectly clear case, where it is plain that only one reasonable inference is possible, the court will decide it as law. If no reasonable inference is possible, the court must decide the question against the party who has the burden of proof, usually the party who asserts that the other was negligent, and must not permit the jury to make a decision which would rest upon a mere guess and not upon reasonable inference.

However, a decision by the court that certain conduct was or was not reasonable or negligent becomes a precedent. The circumstances of a case in which such a decision is made may be so peculiar that a similar case will never arise again. If so, the precedent is of no importance as a precedent. But the group of facts may on the other hand be one that may often arise, and the precedent be controlling whenever that happens. In this way, although negligence is regularly in law and always in its own nature a question of fact, a number of positive rules of considerable generality have been evolved, that certain conduct in certain circumstances is or is not negligent *per se* or as law. When one of those rules applies, the question of negligence is really one of law. Instances of such rules are the rules about looking and listening before crossing a railroad track; the rule that it is not *per se* negligent to act so as to expose another to temptation to do wrong, though that may be negligent in particular circumstances; the rule that it is negligent to point a gun at another person and pull the trigger, even though the actor believes the gun to be unloaded.

Although duties as to due care do not fall within the intended scope of this article, a few words as to such duties will be added.

A duty to use care is a duty to act or omit with reference to the attainment of a certain end or object, what has been above spoken of as the principal object. The law sets that end before the actor and commands him to direct his conduct towards its attainment,

either by doing acts to accomplish it or by abstaining from acts which will tend to defeat it. But in common-law duties the law specifies only the end, not any particular means to be used. The duty is a generalized one to do whatever is reasonably necessary. The actor chooses for himself, at his peril, what particular acts he will do or abstain from. Therefore, in the case of such a generalized duty, it is error for the court to decide or permit the jury to find that due care required the use of specific means, though such an error may be harmless where those were plainly the only possible means.[19] To do so would be to impose a special duty, different from the generalized duty to use care, which the court or jury has no right to do. For instance, although an innkeeper must use due care for his guests' personal safety, it cannot, in the absence of a statute, be laid down as a rule of law that he is negligent in not providing his house with fire escapes.[20]

When a common-law duty exists to direct conduct towards a certain end, certain particular means are sometimes required by statute. Thus an apothecary ought to use care not to sell poison in circumstances where danger will probably arise from its being mistaken for a harmless medicine. If there is such a danger, he can guard against it in various ways, and under the generalized duty he may choose any of those ways. But a statute may require him to put a particular kind of label on the bottle. So a city may be under a generalized duty to use care to prevent persons from falling into an excavation in the street, which it can perform by taking various precautions. But a statute may specifically require a fence or lights at night.

Such statutes create specialized duties, which in their own nature are not really duties to use care for an end, but are positive peremptory duties to do certain acts precisely described. The object to be attained merely furnishes the reason why such a duty was created; it does not enter at all into the definition of the duty, as does the object when the duty is really to use care. Such duties lie in strictness outside of the law of negligence. But breaches of them are usually called negligence. When the object is also the object of a generalized duty to use care, and the specialized duty in fact

[19] McGrath *v.* New York Cent. & H. R. R. R. Co., 63 N. Y. 522 (1876); Legge *v.* Tucker, 1 H. & N. 500, 26 L. J. Ex. 71 (1856).

[20] Yall *v.* Snow, 201 Mo. 511, 100 S. W. 1 (1906).

overlaps the generalized duty and merely, in effect, points out a preferable manner of performing it, the action may usually be for a breach of either duty; and if the generalized duty is sued upon, the breach of the specialized one will usually be evidence, sometimes conclusive evidence, of negligence. In such cases there seems to be no very strong objection to classing the specialized duty among duties to use due care and calling its breach negligence. But when there is no generalized duty to use care for a certain object, either no common-law duty at all or the common-law duty is not simply to use care but is a peremptory duty to accomplish the end, such a classification and nomenclature is wrong and confusing. Thus the duty of the keeper of a fierce dog, which he knows to be such, to prevent it from biting another person is not a duty to use care. It is peremptory. If the dog bites any one, the keeper is liable, whether he was negligent or not. On the other hand, dogs not being generally dangerous, if he does not know of the dog's propensity, he is under no duty at all. In either case a statutory duty to muzzle the dog should not be classed as a duty to use care, or letting the dog go at large unmuzzled, as negligence.

There is a negative duty of due care of very great generality, resting upon all persons and owed regularly to all persons, not to do negligent acts, *i. e.*, acts which are unreasonably dangerous to persons or tangible property. There is some conflict of opinion as to whether this duty is owed to persons who are in the situation of trespassers or licensees.

There is no affirmative duty of equal generality, *i. e.*, no general duty to do acts, to take precautions, to prevent injury to others. The general rule is, that a person is not bound to do acts for others' benefit; he may sit still and let things take their course. Affirmative duties to do acts to protect others arise only out of special circumstances in which the actor is placed. Without trying to go into details, to define the duties precisely, or to make an exhaustive enumeration, the most important of those affirmative duties are as follows:

(1) A person who has done or is doing an act that will be unreasonably dangerous unless precautions are taken against the danger, must use due care to take such precautions as reasonableness requires. If the precautions are not taken, then in an action for a tort usually either the doing the act, which would be a breach

of the preceding duty and a malfeasance or misfeasance, or the omission of the precautions, which would be a non-feasance and a breach of this present duty, may be made the ground of complaint. When the precautions ought to be taken at the time of the act, the doing the act without the precautions is often spoken of as doing a lawful act in an improper manner, which is a misfeasance.

(2) A person who delivers a thing to another or furnishes a thing for another's use, comes under duties to use care either not to deliver or furnish a thing which is unreasonably dangerous at all, or, if the thing is dangerous but it is nevertheless not wrong to deliver or furnish it, to take precautions, if reasonableness requires that, against the danger. Often reasonableness will not require any precautions. There is no general rule that it is unreasonably dangerous to deliver or furnish a dangerous thing to or for another even without taking any precautions against the danger. The deliveree or furnishee may understand the nature of the thing and be able to guard himself; or it may be a sufficient performance of the duty to warn him of the danger. In the case of furnishing things for use, there is some conflict of opinion as to what kinds of things are so dangerous as to bring this duty into operation. It is laid down that the thing must be "inherently dangerous." There is also a great and irreconcilable difference of opinion as to who the person is for whose use the thing is deemed to be furnished, and to whom the duty is owed.

(3) In some circumstances a person having a dangerous thing in his possession which is attractive to children or animals, in a place where, led by their natural instincts which they cannot be expected to resist, they will be tempted to meddle with it and so expose themselves to danger, must take reasonable precautions against that. The authorities conflict as to whether this duty applies when the child or animal is a trespasser.

(4) The possessor of a dangerous thing must use due care to prevent it from doing harm. This duty is owed for the protection of persons or things being where they are by virtue of a right. There is no general duty not to keep dangerous things in one's possession, and to do so is not *per se* negligent. As to some kinds of dangerous things, *e. g.*, dangerous animals and under the old common law fire, there is a peremptory duty to prevent them from doing harm, which is not merely a duty to use care. In some places there is

such a strict duty as to actively dangerous things generally; in other places not.

(5) A person who invites another person to put himself or his belongings into a place of danger must take such precautions as reasonableness requires, if any, to protect him against the danger. This is sometimes spoken of as a duty to make the place safe or to provide a safe place; but that is not in general a correct statement of the duty. In many cases the duty may be performed in that way. That will often be the most convenient, or sometimes the only practicable, way of performing it; but if the place is not or cannot be made safe, the taking of other precautions may be a sufficient compliance with the duty. Sometimes giving warning to the invitee is enough. This duty is owed only to invitees, not to persons who come into the place by right, nor to licensees or trespassers. But there seems to be a more limited duty to licensees, to use care to protect them against concealed danger in the nature of traps.

(6) Bailees of things or services owe certain duties of active care, even aside from contract, breaches of which may give ground for actions of tort.

(7) Such duties may be created by contract.

(8) Such duties arise from certain relations, such as that of husband and wife or parent and child. These are often imperfect duties. Public officers may have such duties.

(9) Many equitable duties are of this kind, *e.g.*, duties of trustees as to the trust property, which resemble duties of bailees.

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